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MICHAEL RODAK, JR.

Supreme Court of the United States

October Term, 1973

No. 73-1336

LARRY HARDY

and

PUSSYCAT CINEX, INC.,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

JAMES R. WILLIS, ESQ.
1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
216/523-1100
Attorney for Petitioners

JOHN T. CORRIGAN
Cuyahoga County Prosecutor
Criminal Courts Building
1560 East 21st Street
Cleveland, Ohio 44114
771-0660
Attorney for Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners herein, pray that a writ of Certiorari issue to review the judgment of the Ohio Supreme Court which became final on December 5, 1973.

OPINIONS OF THE COURTS BELOW

The opinion of the Ohio Supreme Court to which this Petition is directed was officially reported as *State v. Cinex*, 36 Ohio St. 2d 108 (December 5, 1973). This opinion is attached here as appendix "A" at page 17. The formal entry made by the Ohio Court of Appeals is unreported but is designated herein as appendix "B", and is attached at page 124. The original order, made by the Cuyahoga County, Ohio, Common Pleas Court is attached as appendix "C" at page 37.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio having been rendered on December 5, 1973, the jurisdiction of this Court is invoked under Title 28, U.S.C., §1257(3).

STATEMENT OF QUESTIONS INVOLVED

1. Can one be adjudged to be in contempt for refusing, on the grounds of self incrimination, to produce films following a judicial determination that there was "probable cause" for the Court to believe they were "obscene."

2. Can an employee of a corporation, who disclaims any specific knowledge as to the whereabouts of certain "obscene" films be held in contempt, absent proof either that he had such films in his custody, or otherwise had the power to comply with the order.

3. Can one be held in contempt for failing to comply with an order which the Court lacked the power to make.

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

Constitution of the United States:

Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Revised Code, Section 2905.35:

"No person, with knowledge of the content and character of the obscene material or performance involved, shall

make, manufacture, write, draw, print, reproduce, or publish any obscene material, knowing or having reasonable cause to know that such material will be sold, distributed, circulated, or disseminated; or sell, lend, give away, distribute, circulate, disseminate, exhibit, or advertise any obscene material; or write, direct, produce, present, advertise, or participate in an obscene performance; or possess or have in his control any obscene material with intent to violate this section; or offer or agree to do any act in violation of this section, or cause any such act to be done by another.

Whoever violates this section shall be fined not more than five thousand dollars or imprisoned not more than one year, or both, for a first offense, and for each subsequent offense shall be fined not more than ten thousand dollars or imprisoned not less than one nor more than seven years, or both."

Ohio Revised Code, Section 2905.37:

"(A) Where it appears that section 2903.14 or 2905.-35 of the Revised Code is being or is about to be violated, the county prosecutor or chief executive or legal officer of a municipal corporation in the jurisdiction where such violation is taking place or is about to take place, may maintain an action in the common pleas court to enjoin the sale, distribution, or presentation of the obscene material or performance, or enjoin the sale, distribution, or presentation to minors under eighteen of the material or performance harmful to minors.

"(B) The defendant is entitled to trial on the merits within five days after joinder of the issues, and the court shall render its decision within not more than five days after conclusion of the trial. If the court finds that such

material or performance is obscene, it shall enjoin the sale, distribution, or presentation of such material or performance, if the court finds that such material or performance is harmful to minors, it shall enjoin the sale, distribution, or presentation of such material or performance to minors under eighteen."

STATEMENT OF THE CASE

Following an *ex parte* showing, based solely on the affidavit of a Cleveland Police officer,[1] the Court summarily scheduled an "adversary hearing" into the question of the alleged obscenity of certain motion picture films that were being exhibited at the Pussycat Cinex.[2] Of significance here, the Court's order scheduling the hearing specifically stated that in the event the theater did not desire to produce the films at the hearing, "the owners, management, operators and employees" were enjoined from concealing, destroying, or tampering with the films until further order of the Court.

The evidence presented, which focused on the content of these films, resulted in a judicial determination that the films were "obscene" (R. 23).[3] Thus, it was following this judicial finding the Court, "ordered that . . . [the obscene] films be brought back to . . . Court immediately and that Mr. Larry Hardy, who . . . [was] present in . . . Court, should produce them (*ibid.*).

The record also shows counsel indicated to the Court that the position being taken by Larry Hardy, with refer-

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1. Appendix D, *infra*, page 38.

2. Appendix E, *infra*, page 39.

3. References are indicated as follows: To the numbered pages of the Bill of Exceptions, i.e., the transcript of testimony in the state court (R.).

ence to this order, was that he ran the risk of incriminating himself if he produced the films in compliance with the Court's order (R. 24). This representation prompted the Court to question Larry Hardy as to whether he had possession of the films in question, or if he knew of their whereabouts. Hardy's responses were negative to both questions (R. 25-26). Despite these responses, the Court, simply because Hardy had seen the order scheduling the hearing (Appendix "E"), made the order committing him to custody until he produced the films so they could be used as a basis for criminal prosecution (R. 27)

On Appeal to the Ohio Court of Appeals, the judgment of the Trial Court, finding Hardy to be in contempt, was reversed in a 2-1 decision. This judgment in turn was reversed by the Ohio Supreme Court. It is this latter judgment that is the target of this petition.

STATEMENT OF FACTS AND EVIDENCE

Contrary to the thrust of the prosecutor's narration of the facts the following assertions made to the Ohio Supreme Court in the State's Brief must be dealt with, otherwise this Court may accept such assertions as valid since the Ohio Supreme Court obviously did these are:

(1) "The defense made no contention that Mr. Hardy did not have control or accessibility to the motion picture films in question" (*Appellant's Brief*, p. 3).

(2) "The Court determined that there was probable cause that the movie films were obscene" (*ibid.*).

(3) "Mr. Hardy agreed with his attorney that they would not produce the films because of a self-incrimination privilege" (*id.*, at p. 4).

Any meaningful, or otherwise apt, distillation of evidence in this could not possible show either that Hardy appeared at the so-called "adversary hearing" in a representative capacity, or that he was in any way responsible for the whereabouts of the films at the precise time they were sought by the Court. This latter idea is crucial when it is understood that the original order—scheduling the hearing—did not require production of films by Hardy or anyone else (see original order).

The evidence bearing on these points simply illuminated the fact that Hardy worked for the corporation and that he was responsible for films in question being shown (R. 12). This is a far cry from proof Hardy appeared as representative of the corporation[4] (assuming that corporation was Pussycat Cinex), and that he could produce (even if he had wanted to) the films, whose whereabouts he did not admit being aware of (R. 25-26).

Granted, the above analysis is quite compelling, but the greater questions here, which hopefully will be resolved, are whether the Constitution protects an individual from producing, solely for the convenience of a prosecuting authority, physical property which has previously been declared *obscene*.[5] And, whether the Court can exceed his statutory authority, which only authorizes enjoining the sale and distribution of obscene material, by not only illegally confiscating such material but by granting the State a virtual license to utilize such property as a basis for a criminal prosecution.

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4. (R. 13).

5. As to this declaration it must be said the journal entry says that there was probable cause to believe they were obscene. Yet, the Court did in fact declare these films could not pass the obscenity test (R. 23).

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

Preliminary Statement

The Ohio Supreme Court's opinion, and that taken by the State below is premised, in our judgment at least, upon the inappropriate notion that only a Fifth Amendment contention was raised against the position taken by the trial court. Simply put, our position was, and is, that both the Fourth and Fifth Amendments apply to prohibit the forced disclosure of incriminating evidence. See *Hale v. Henkel*,[6] 201 U.S. 43 (1906), and *Mapp v. Ohio*, 367 U.S. 643 (opinion by Justice Black). Also see *Ballman v. Fagin*, 200 U.S. 186, where the Court (citing *Boyd v. United States*) recognized the right of a witness not to testify about the location of a book which might incriminate him.

Apart from the cogency of these precedents, the State may still argue that the Court of Appeals' opinion completely "misinterprets the meaning of the Fifth Amendment and the existing law," by its ruling that the "production of the films would amount to self-incrimination on the part of Mr. Hardy" (*ibid.*).

The problem one has in following the State's argument here, of course, is not limited to its failure to deal with the Fourth Amendment problem. In meeting the argument head on, even greater flaws emerge. Here, we start with their basic premise that the Fifth Amendment protection "*only*" applies to testimonial or communicative utterances.

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6. In *Hale v. Henkel*, the Court concluded that a subpoena *duces tecum* for the production of books and papers could constitute an unreasonable search under the Fourth Amendment (201 U.S., at 76).

As to the cogency of such cases as *Schmerber v. California*,[7] *Gilbert v. California*[8] and *State v. Ostrowski*[9] used by the State as support for the proposition that the taking of voice and handwriting exemplars does not violate the protections offered thereby, there can be no dispute.

On the other hand, it does not follow that the above cited cases control the situation before us. The most apparent reason why this is so, is the fact that none of these cases entails the production of any contraband substances or properties. Thus, it is a *non sequitur* to argue that because one can be compelled to produce (as the prosecutor argues) non-testimonial evidence—such as blood, exemplars of voice or handwriting—the production of contraband material or substances can likewise be required. This is so here for what can be classified as apparent reasons.

The second proposition argued by the State is likewise premised on a faulty generalization. Here, they argue that, "films are not communicative", and that a "corporation can be compelled in an adversary hearing to produce allegedly obscene films" (*Appellant's Brief*, pp. 8-9).

The situation here, in our judgment, is controlled by the reasoning supplied by the Court in *Grand Jury v. United States*, 435 F.2d 350 (1970).

As were the facts in the above case before Judge White there was no showing that Larry Hardy bore the proper relationship to the corporation to be deemed as having asserted the privilege on behalf of the corporation.

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7. 384 U.S. 757 (1966).
8. 388 U.S. 263 (1967).
9. 30 Ohio St. 2d 34 (1972).

Specifically, in the cited case, the Court took pains to hold that "a summary proceeding in civil contempt was appropriate to coerce . . . [one] to perform his obligation to the Grand Jury *if* the obligation had been established with certainty" (435 F.2d, at 354). (Emphasis supplied.) Here, of course, there was no showing that Hardy had an obligation to perform the act the Court asked him to perform. Nor was there any showing that he had the ability to so perform.

Further, as to the existence of any such obligation, it is clear from the record here Hardy was talking not about incriminating the corporation but himself (R. 15). Surely the fact that this was precisely what he was doing makes his right to do so absolute. Otherwise, the rule must be that simply because the primary thrust of a possible prosecution may be as against a corporation, any individual caught in the scope of the investigation somehow loses the protection of the Constitution.

Next, and this may prove to be significant, the facts here clearly show the assertion by Larry Hardy of the Fifth Amendment was in his own behalf, and not in behalf of the corporation. Thus, even if it is argued that a corporation cannot assert the privilege, this tenet should not be regarded as a matter of consequence here.

In his dissenting opinion, Judge Manos argued (as does the appellant here) that, "since the trial court in this case . . . did not require incriminating testimony of . . . [Hardy] . . . no violation of the Fifth Amendment occurred." (Appendix "B", *infra*, p. 24). His premises for this conclusion were holding from *Schmerber*[10] and *Curcio*[11] (both cited in his opinion) to the effect "that

10. 384 U.S. 757 (1966).

11. 354 U.S. 118 (1957).

compulsion which makes a suspect or accused the source of 'real or physical evidence' does *not* violate . . . [the privilege]" (*ibid.*), and in any event, "books and records of corporations cannot be insulated from *reasonable* demands of governmental authorities by a claim of personal privilege on the part of the custodian" (*ibid.*). (Emphasis supplied.)

Aside from being a *non sequitur*, such reasoning is fallacious for the following additional reasons. *First*, the decision of *Boyd v. United States*, 116 U.S., at 633 (1886), surely must be recognized as standing for the thesis that the privilege can be invoked against the forced disclosure of physical evidence. Thus, acceptance of Judge Manos' position requires not only the rejection of *Boyd*, but the decision of *Ballman v. Fagin*, 200 U.S. 186, as well. Also see *Hale v. Henkel*, 201 U.S. 43 (1906).

Next, as to the expressed position that Hardy could, in spite of his privilege, be compelled to produce contraband, ostensibly in possession of the corporation, it is significant here, the Supreme Court, in *United States v. Kordel*, 397 U.S. 1 (1970), expressly ruled that, "surely . . . [even a corporate officer] is not barred from asserting his privilege simply because the corporation had no privilege of its own, or because the proceeding in which the government sought information was civil rather than criminal in character" (397 U.S., at 7-8). Since the privilege, as asserted by Hardy, was personal, as distinguished by being on behalf of the corporation, it became clear beyond cavil he could not be penalized as a consequence of his exercise of this right. *Spevak v. Klein*, 385 U.S. 511 (1967).

Thus, it must be apparent to this Court, as it was to the Court of Appeals, Hardy could not be denied the protection of the privilege simply because he was an employee of a corporation. To be sure, absent a showing

Hardy was asserting the privilege on behalf of the corporation, or that he bore such a relationship to the corporation to be deemed as having asserted the privilege on behalf of the corporation, his refusal to incriminate himself could not be contemptuous.

I. The Privilege Against Self-Incrimination Is a Sufficient Bar Against a Finding of Contempt for Failure to Produce "Obscene" Films.

Simply put, the State has here contended (without the benefit of law, logic, or common sense to support them) that despite the express prohibition against compulsory self-incrimination, the invocation of the privilege cannot survive a court order to produce incriminating evidence. Given, as is the case here, the State's expressed intent to submit the property Larry Hardy was ordered to produce to the Grand Jury, then the efficacy of the privilege to these facts becomes even more cogent. This contention is made apart from the fact that submission to the Court's order perforce would have resulted in the confiscation of a valuable product—a product that was neither owned nor controlled by Hardy when the order was entered.

As to the crucial contention that the assertion of the Fifth Amendment affords appellee an absolute defense against a charge of contempt, it may suffice simply to say the Court certainly has no more power in a civil proceeding to order the production of incriminating documents than it would have to do so by way of subpoena. In line with this, one needs only recall that *Boyd v. United States*, 116 U.S. 616 (1886), possibly the single most important case that led to the creation of the exclusionary rule, involved a subpoena for the production of certain

documents. There, the Court held that, "compelling the production of one's private books and papers to convict him of a crime or to forfeit his property is contrary to the principles of a free society" (*id.*, at 631-632).

This same principle has been extended so as to permit a taxpayer to assert the Fifth Amendment against the forced production of his records, in response to summons and subpoenas issued by the Internal Revenue Service.[12] Two recent cases point this out. One is *Hill v. Philpott*, 445 F.2d 144 (1971), where pursuant to a search warrant certain records were seized from a doctor's office. The Court, after recognizing that these records would have been deemed privileged if sought by summons or subpoena, ruled they were no less privileged when sought and obtained by a search warrant.

Relying on this thesis, our local District Court most recently held that where certain property was *self-incriminating* its production could properly be refused by the assertion of the privilege against self-incrimination. In the case being referred to, *United States v. Blank*, 330 F. Supp. 783 (1971), the Court further indicated the test must be whether the property would be considered privileged if sought by subpoena or summons. If this is so, then it follows one can properly refuse to produce such physical property.

As applied to the facts before this Court, since the films Larry Hardy was ordered to produce could incriminate him, his Fifth Amendment assertion against the order that he produce them as an aid to his own prosecution must be deemed well taken.

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12. In *Ballman v. Fagin*, 200 U.S. 186, this Court, citing *Boyd*, specifically recognized that the privilege protected a witness from testifying as to the location of a book that could incriminate him.

II. One Cannot Properly Be Regarded as Being in Contempt for Failing to Comply With an Order Which the Court Lacked the Power to Make.

Aside from the above constitutional argument, consideration must be given to the statute under which the original procedures in this cause were conducted. To begin with, this statute (*R.C. of Ohio*, §2905.37) must be regarded as expressing the legislative will as to how obscenity should be regulated in this state.

Specifically, this statute authorizes the prosecutor to seek an injunction against the exhibition of an obscene film. This end is achieved by the institution of an appropriate proceeding in the Common Pleas Court. This was done here. And, as Appendix "F" to this brief shows, the prosecutor filed his *Motion for Adversary Hearing*. Based on this the Court, on the prosecutor's unilateral request that he do so, not only scheduled the hearing at a time that allowed appellee less than 24 hours' notice (R. 2-3, 24-25); the Court adamantly refused to continue the cause until the next court day unless counsel gave certain assurances which, in counsel's judgment, would have meant compromising his client's rights. (Here reference is made to the fact that a continuance would have been granted if counsel had assured the Court that the films sought would in fact be produced on the continued date. Counsel could not, of course, give such assurance.)

Be all that as it may, it seems clear that under the statutory procedure invoked by the State, the outer limits of any order the Court could issue, if such films are found to be obscene, would be to "enjoin the sale, distribution, or presentation" thereof. Nowhere does the law give the Court the power to confiscate.

To be sure then, in face of counsel's affirmative representation to the Court that appellee would submit to any injunction the Court could make in these premises, the Court's need for the films cannot be justified. This is especially so since the order entered by the Court, scheduling the hearing, most pointedly had stated that it was not necessary for the films to be produced. The clear inference being the question of alleged obscenity could be resolved by the Court without the films.

Next, as the record shows, the Court determined that the films were *obscene* (R. 23). Following this judicial determination, Larry Hardy was ordered to produce these "obscene" films (R. 24). So structured, it is, of course, apparent that these films were not needed to aid in any determination as to whether they were obscene—for that determination had been made. Not only this, counsel had indicated that they would submit to any injunction the Court could possibly enter (R. 19). Thus, it can only follow that the finding of contempt against Larry Hardy must be regarded as having been imposed without judicial authority, and as such, was, and is, manifestly an illegal order.

CONCLUSION

In many ways there is a direct comparison between the procedure approved here (by the Ohio Supreme Court) and that deemed impermissible (by our Federal District Court) in *Smith v. Fair*, 363 F. Supp. 1021 (1973). In the cited case, a county prosecutor sought by way of subpoena to require a projectionist to provide certain films at an adversary hearing. Despite the contention that the subpoena constituted an unconstitutional abridgement of 5th amendment rights, the petitioners (in the *Smith v. Fair* case) were found to be in contempt.

The district court in granting the writ, held in the *Smith v. Fair* case, that in the absence of any extension of immunity for past acts, a subpoena *duces tecum* requiring the production of allegedly obscene films would violate constitutional rights. So in this case the position here is the same. In our judgment the production of the "obscene films" would have provided a firm basis for Larry Hardy's prosecution.

For this and all of the reasons argued above the petition for writ of certiorari should be granted in this case.

JAMES R. WILLIS, ESQ.
1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
216/523-1100
Attorney for Petitioners

APPENDIX A

Opinion and Judgment of the Supreme Court of Ohio (36 Ohio St. 2d 108)

(Decided December 5, 1973)

No. 73-175

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, APPELLANT, *v.* PUSSYCAT CINEX; HARDY, APPELLEE.

Criminal procedure—Contempt of court—Obscene motion picture film—Theater manager ordered not to conceal or remove—Manager's refusal to produce film—Contemptuous conduct, when—Validity of court's order—Evidence—Hearing.

In an adversary hearing had upon a law enforcement officer's affidavit which explicitly describes scenes in certain motion picture films of acts of sexual intercourse, penetration, oral sodomy, ejaculation, and cunnilingus, for the purpose of establishing the obscenity of such motion picture films, where the evidence in the record discloses that the trial court has issued a prior written order instructing the defendant theater and its management, operators, and employees not to conceal, destroy, tamper with, or alter, or remove said films from the premises, subject to a contempt sanction; that the defendant-manager of the theater saw a copy of the court's written order on the day it was served on his ticket seller; and that he admitted possession of the films on the premises at that time, defendant's subsequent refusal to produce the

films, after an oral order of the trial court at the adversary hearing to produce them, constitutes contempt of the court's orders.

APPEAL from the Court of Appeals for Cuyahoga County.

On November 4, 1971, at approximately 11:00 a. m., James G. Kennelly, a detective in the Cleveland Police Department, paid $4.00 admission to view five short motion picture films at the Pussycat Cinex theater, located in the city of Cleveland, Ohio.

Following the viewing of the films entitled "ious Lush," "xie Tricks," "Tit for Tat," "Salesman" and "Bi-Girl," the detective swore to an affidavit explicitly describing scenes therein, of acts of sexual intercourse, penetration, oral sodomy, ejaculation and cunnilingus.

Thereupon, the Prosecuting Attorney for Cuyahoga County moved, in the Court of Common Pleas, for an adversary hearing to determine whether these films were, in fact, obscene. The court granted the motion and issued an order[1] to Pussycat Cinex, informing it of the motion

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1. The order of the Court of Common Pleas reads as follows:

"The court upon good cause shown grants the prosecuting attorney's motion for an adversary hearing with respect to the movie films entitled 'ious Lush,' 'xie Tricks,' 'Tit for Tat,' 'Salesman' and 'Bi-Girl' now being shown at the Pussycat Cinex located at 10606 Euclid Avenue, Cleveland, Ohio, County of Cuyahoga.

"Further, the court grants to the Pussycat Cinex full opportunity for a complete hearing and should Pussycat Cinex desire to produce the said films at the time of the hearing, the court will make a full review of their contents taking into consideration the present laws of obscenity.

"It is further the order of this court that in the event the said Pussycat Cinex does not desire to produce said films at this hearing that the owners, management, operators and employees of this Pussycat Cinex do not conceal, destroy, tamper with, or alter, or remove the said movie films entitled 'ious Lush,' 'xie

(Continued on following page)

and granting a full opportunity for a complete hearing. The court also stated in its order:

> "* * * that in the event the said Pussycat Cinex does not desire to produce said films at this hearing that the owners, management, operators and employees of this Pussycat Cinex do not conceal, destroy, tamper with, or alter, or remove the said movie films entitled 'ious Lush,' 'xie Tricks,' 'Tit for Tat,' 'Salesman' and 'Bi-Girl' from the premises of the Pussycat Cinex until further order of the court following the adversary hearing to be held on Friday, November 5, 1971 * * *."

The order also provided that violation of any portion of the court order would be deemed to be contempt of court.

The court order was served at 3:10 p.m. that same afternoon, November 4, 1971, on one Larry Carter, the man assigned to the ticket booth.

The record indicates that, at the adversary hearing held on Friday, November 5, 1971, the appellee-manager, Larry Hardy, testified that he was the manager of the Pussycat Cinex and that he was responsible for the showing of all films on the premises. He testified further that he saw a copy of the court's order on November 4, 1971, and that, at that time, the films in question were

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Footnote continued—

Tricks,' 'Tit for Tat,' 'Salesman' and 'Bi-Girl' from the premises of the Pussycat Cinex until further order of this court following the adversary hearing to be held on Friday, November 5, 1971, in the Court of Common Pleas, Criminal Courts Building, 1560 East 21st Street, Cleveland, Ohio at 1:30 PM.

"Any violation of any portion of this court order shall be deemed to be contempt of court and any person who violates this order shall be summarily brought before this court for contempt proceedings."

in the Pussycat Cinex. Hardy also testified that he was "pretty sure" that the films were being shown at that time.

The court found that there was probable cause that the films in question were obscene and ordered Hardy to produce the films "in court today." Confronted with the court's order, Hardy refused to produce the films, on the ground that disclosure of the films would violate his Fifth Amendment rights against self-incrimination.[2]

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2. "Mr. Willis: I can assure the court that the films will not be available when the police appear, so that—because we feel that the disclosure of these films would violate the Fifth Amendment; so that we may as well take the next step, at least insofar as Mr. Hardy is concerned.

"* * *

"I can represent to the court that the film will not be produced. We are going to fight this on that point.

"The Court: Mr. Hardy, step forward.

"Mr. Hardy, you have heard what your lawyer has to say. Sir, I have heard you say that you are the manager of Pussycat Cinex?

"Mr. Hardy: That's correct.

"The Court: Is this true? And sir, do you have the movies that we have been discussing in your possession?

"Mr. Hardy: No, sir, I don't.

"The Court: Do you know where they are?

"Mr. Hardy: No, sir, I don't.

"The Court: You don't know where they are?

"Mr. Hardy: No.

"The Court: Did you receive a copy of this order yesterday, or did you see a copy?

"Mr. Hardy: I saw a copy.

"The Court: You saw a copy yesterday?

"Mr. Hardy: Yes, sir.

"The Court: Were these films in the Pussycat Cinex then when you saw a copy of this (indicating)?

"Mr. Hardy: I imagine they were, yes, sir.

"The Court: Were they being shown then?

"Mr. Hardy: Yes, sir, they were, I'm pretty sure.

"The Court: All right, sir. I am ordering you to produce those films in court today.

"Mr. Willis: Your Honor, I think we have already said we are not going to produce them.

"The Court: I understand; do you agree with your attorney, you are not going to produce them?

"Mr. Hardy: Most certainly I agree with my counsel.

"The Court: All right; then we are finding you in contempt and order that you be held in county jail until you produce them."

The court then found Hardy in contempt and ordered him held in the county jail until such time as he produced the films.

Upon appeal, the Court of Appeals reversed the judgment of the Court of Common Pleas upon the basis that the record was devoid of any evidence that Hardy was able to comply with the oral order issued by the Court of Common Pleas at the adversary hearing; and that the evidence was insufficient to support a finding that Hardy had possession and control of the films at the time of the hearing or that he refused to produce them for the court.

The cause is now before this court pursuant to the allowance of a motion for leave to appeal.

Mr. John T. Corrigan, prosecuting attorney, and *Mr. George J. Sadd*, for appellant.

Mr. James R. Willis, for appellee.

CORRIGAN, J. The single issue presented by this appeal is whether appellee, Hardy, should have complied with the court's order to produce the films in question.

The cases clearly establish that a corporation cannot claim the privilege against compulsory self-incrimination. *United States v. Kordel* (1970), 397 U.S. 1.

Similarly, a corporate officer may not withhold testimony or documents on the ground that his corporation would be incriminated, nor may the custodian of corporate books or records withhold them on the ground that he personally might be incriminated by their production. *Hale v. Henkle* (1906), 201 U.S. 43; *Wilson v. United States* (1911), 221 U.S. 361; *Essgee Co. v. United States* (1923), 262 U.S. 151; *Curcio v. United States* (1957), 354 U.S. 118. Likewise, in *McPhaul v. United States* (1960), 364 U.S. 372, rehear-

ing denied, 364 U.S. 925, the Supreme Court of the United States held that books and records kept in a representative rather than a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the records might tend to incriminate their custodian personally.

The court, in *McPhaul*, also reiterated the rule that a court will not imprison a witness for failure to produce documents which he does not have, unless he is responsible for their unavailability or is impeding justice by not explaining what happened to them. See, also, *Jurney v. MacCracken* (1935), 294 U.S. 125; *United States v. Goldstein* (1939), 105 F.2d 150; *United States v. Bryan* (1950), 339 U.S. 323.

More importantly, in *McPhaul,* the court held that it was incumbent upon a defendant in a contempt proceeding to show that the records called for by a subpoena did not exist, or that they were not in the defendant's possession or subject to his control at the time their production was requested.

In the case at bar, the Court of Appeals based its judgment upon the ground that Hardy did not have possession of the films in question nor were they subject to his control at the time the trial court orally ordered him to produce them at the adversary hearing. That judgment is erroneous and contrary to the evidence clearly presented in the record.

The Court of Appeals' judgment ignores the trial court's valid order, dated November 4, 1971, which prohibits the Pussycat Cinex, its owners, management, operators and employees from concealing, destroying, tampering with, or altering, or removing the five films in question from the premises of the theater. The record establishes that this order was served upon an employee of the theater on

the afternoon of November 4th; that the order was seen by the manager, Hardy; and that the films in question were on the premises of the theater at that time.

At the close of the adversary hearing, on November 5th, Hardy was ordered to produce the films. Considering the oral order of the court at that hearing, together with the court's written order of the preceding day, it is clear that Hardy was responsible for the alleged unavailability of the films, and that he failed to introduce any evidence to the contrary.

It cannot be said that the mode of procedure exercised by the trial court in this case was violative of Hardy's rights under the First Amendment, since the state has a legitimate interest in preserving the films as evidence in a criminal proceeding, even to the point of seizure, pending a prompt adversary hearing on the obscenity issue. *Heller v. New York* (1973), 409 U.S. 1021, 37 L.Ed.2d 745.

In the present case, the trial court did not interfere with Hardy's First Amendment right to the distribution of the films; it merely exercised its legitimate right to preserve the films as evidence in a subsequent criminal proceeding. Upon the basis of evidence in the record, the judgment of the Court of Appeals is reversed and this cause is remanded to the Court of Common Pleas for execution of sentence.

Judgment reversed.

O'NEILL, C.J., HERBERT, STERN, CELEBREZZE, W. BROWN and P. BROWN, JJ., concur.

APPENDIX B

Opinions and Journal Entry of the Court of Appeals

(Dated January 4, 1973)

No. 31977

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT, COUNTY OF CUYAHOGA

STATE OF OHIO,
Appellee,

v.

PUSSYCAT CINEX, *et al.*,
Appellants.

JOURNAL ENTRY

This cause came on to be heard upon the pleadings and the verbatim transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Common Pleas Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

On November 4, 1971 a Cleveland police detective paid $4.00 admission to appellant movie theater (hereinafter referred to as Theater), located in Cleveland, and saw five movies which he claimed, in an affidavit signed shortly thereafter, to be obscene. The affidavit, appended

to Appellant's Brief, describes the films' contents in vivid and lurid detail. After the viewing, the prosecutor moved before Judge George White for an adversary hearing to determine whether the films were, in fact, obscene. The court granted the motion and issued an order to the Theater informing them of the hearing and permitting them to submit the films for the court to determine whether or not they were obscene. The order also stated that, should the Theater desire not to produce the films at the hearing, the Theater should "not conceal, destroy, tamper with, or alter, or remove the said movie films. . . ." The court order stated that any violation of any portion of the order would be deemed a contempt of court. The adversary hearing was set for the next day, November 5, 1971. On that day, Larry Hardy, manager of the Theater appeared in court with counsel.

According to the record, the hearing consisted of testimony by the complaining detective and by the Theater manager. There was no defense testimony that the films were not obscene. Hardy admitted 1) being manager (Tr. 12, 25), 2) having seen the court order referred to above (Tr. 26), and stated that he neither had the movies in his possession nor knew their whereabouts. (Tr. 25-26) To all other questions he pled the 5th Amendment. (Tr. 13-16)

The court found probable cause that the 5 films were obscene and instructed the Cleveland Police to proceed to the Theater, to seize them and to return them to the court. (Tr. 23.) At this point, defense counsel informed the court that the films would not be available and would not be produced. (Tr. 24-7.) The court then summarily held Hardy in contempt and ordered him to jail until he produced the movies. (Tr. 27) There are assignments of error. Assignments number 1, 2 and 4 will be discussed together.

ASSIGNMENT OF ERROR NO. 3:

Did the court exceed its authority under R.C. of Ohio, Section 2905.37 (which only authorized enjoining the exhibition of obscene films) by ordering the appellant to produce the films for reasons NOT consistent with the authority given the court under the statute?

This assignment of error is not well taken. ORC Section 2905.37 permits the county prosecutor, where it appears at ORC Section 2905.35 is being violated, to enjoin the performance of an obscene movie. But ORC Section 2905.35 provides imprisonment up to one year and/or a fine up to five thousand dollars for the presentation of an obscene performance. The county thus has two alternatives, pending the outcome of the obscenity determination.

First of all, there is no doubt that movies, as well as printed matter, are protected by the First Amendment. *Interstate Circuit, Inc. v. City of Dallas,* 390 U.S. 676 (1968). The proper procedure for the prosecutor to follow, while fraught with constitutional pitfalls, has been described and circumscribed in a large number of cases. The common denominator and the *sine qua non* in an obscenity action, injunctive or otherwise, is that a prior adversary, judicially supervised hearing *must* be held to determine the obscenity of the objectionable materials, before they can be seized for use as evidence. *A Quantity of Copies of Books v. Kansas,* 378 U.S. 205 (1964); *American News Co. v. Ladas,* 454 F.2d 1237 (6th Cir. 1972); *Bethview Amusement Corp. v. Cahn,* 416 F.2d 410 (2d Cir. 1969); *Tyrone, Inc. v. Wilkinson,* 410 F.2d 639 (4th Cir. 1969); *Metzger v. Pearcy,* 393 F.2d 202 (7th Cir. 1968); *Goodwin v. Morris,* 315 F. Supp. 1325 (N.D. Ohio 1970); *City News Center, Inc. v. Carson,* 310 F. Supp.

1018 (D.C. Fla. 1970); *Miske v. Spicola*, 314 F. Supp. 962 (D.C. Fla. 1969); *Carter v. Gautier*, 305 F. Supp. 1098 (D.C. Ga. 1969).

This is the directive the court below was following. The scheduling of an adversary hearing and the order restraining "owners, management, operators and employees" of the Theater from concealing, destroying, tampering with, altering or removing the films pending the adversary hearing was perfectly proper. *Go v. Peterson*, 480 P.2d 35 (Ariz. App. 1971).

ASSIGNMENTS OF ERROR NOS. 1, 2 & 4:

1) Did the court below err in ruling that the assertion of the privilege against self-incrimination was not a sufficient basis for refusing to produce films that had previously been determined to be obscene?

2) Did the court below deprive the appellant of due process of law by finding him to be in contempt of court for failure to produce certain "obscene" films where the evidence did not show either that he had them in his custody or control, or otherwise had the power to comply with the order?

3) Was the judgment by the court below to the effect that appellant was in contempt for refusing, on constitutional grounds, to produce in open court certain "obscene" films, not sustained by sufficient evidence and contrary to law?

These assignments of error will be discussed as one. They are well taken. It is well established that the "compulsary production of a man's private papers to be used in evidence against him is equivalent to compelling him

to be a witness against himself; and in a prosecution for a crime . . . is equally within the prohibition of the Fifth Amendment." *Boyd v. United States*, 116 U.S. 616, Headnote 6 (1886). The problem before this court has several aspects. The first question that arises is whether this is a criminal prosecution. Several recent Ohio obscenity actions have been civil actions specifically to enjoin a nuisance pursuant to ORC Ch. 3767, *e.g., State ex rel., Keating v. Vixen*, 27 Ohio St. 2d 278 (1971); *State ex rel., Ewing v. Without a Stitch*, 28 Ohio App. 2d 107 (1971); *State ex rel. Dowd v. Pay the Baby Sitter*, 31 Ohio Misc. 208 (C.P. 1972).

The record does not disclose what section of the Ohio Code is being used by the prosecutor in bringing this action. The applicable section would seem to be ORC Section 2905.35, which, *inter alia*, prohibits the presentation of an obscene performance. The word "performance" includes a motion picture. ORC Section 2905.34 (F). The penalty permitted by ORC Section 2905.35 is a fine up to $5,000 and/or up to one year's imprisonment for a first offense. ORC Section 2905.37, as has already been mentioned, permits the prosecutor to bring an action to enjoin a performance which violates ORC Section 2905.35. Therefore imprisonment and/or a fine or an injunction are available to the state against the defendant. As far as this case has proceeded, it cannot be said that there are not criminal overtones. The Fifth Amendment privilege is intended in part to alleviate the fear coming from the possibility of criminal sanctions. *California v. Byers*, 402 U.S. 424 (1971).

Theater is a corporation; Hardy is a private individual, not, so far as the record discloses, a corporate officer. As manager, he can be considered an agent and employee of the corporation. The corporation clearly could not claim

the privilege against self-incrimination. *U.S. v. Kordel,* 397 U.S. 1, 7 (1970). A natural person may be required to furnish corporate records irrespective of possible resulting incrimination. *Hensley v. U.S.,* 406 F.2d 481 (10th Cir. 1968). In a federal grand jury inquiry in *Curcio v. U.S.,* 354 U.S. 118 (1957), the U.S. Supreme Court stated that the "custodian of books and records of a corporation . . . may not, on grounds of possible self-incrimination refuse to produce them pursuant to a subpoena. . . ." but could refuse to "condemn himself by his own oral testimony." A subpoena duces tecum issued against a theater corporation for the production of films to be used as evidence in a state obscenity trial was permissible and presented no Fifth Amendment problems—even without a prior adversary hearing—to a lower court in *People v. P.A.J. Theater Corp.,* 321 NYS 2d 26, 66 Misc. 2d 373 (1971).

The production of private books, records and papers, however, is within the 5th Amendment ambit. In other words the privilege is personal. *U.S. v. Bank of Commerce,* 405 F.2d 931 (3rd Cir. 1969); *Hill v. Philpott,* 445 F.2d 144 (7th Cir. 1971); *U. S. v. Blank,* 330 F. Supp. 783 (N.D. Ohio 1971). The Fifth Amendment privilege has not been extended to a corporation president who failed to file corporate tax returns, since the corporate records required were not personal records. *Heligman v. U.S.,* 407 F.2d 448 (8th Cir. 1969).

The rules require an order to produce to a corporation in order to avoid self-incrimination problems. In the case at bar, the original written order to preserve the film was directed to the corporate theater, but the order to produce at the adversary hearing which resulted in the contempt citation, was delivered orally to manager-Hardy. For this latter order to be valid, it must be issued to

one who has possession, control, or custody of the films, unless he is responsible for their unavailability or is impeding justice in not explaining what happened to them. In other words he must have the ability to comply. *McPhaul v. U.S.*, 364 U.S. 372 (1960); *Nilva v. U. S.*, 352 U.S. 385 (1957): *In re October 1969 Grand Jury v. U. S.*, 435 F.2d 350 (7th Cir. 1971); *Foust v. Denato*, 175 N.W.2d 403 (1970). Whether the thing ordered is within the capability of the person receiving the order is a question of fact for the trial court based upon the evidence presented to it. *Adams's Rib, Inc. v. Milwaukee Acceptance Corp.*, 39 Wis. 2d 741, 159 N.W.2d 643 (1968). The court below decided that Hardy was able to comply on the basis that: 1) he was the theater manager, 2) he saw a copy of the court order of the adversary hearing and 3) the films were being shown in the theater when Hardy saw the order. There was no testimony that the films were still being shown at the time of the adversary hearing. See *Little Beaver Theater, Inc. v. State ex rel. Gerstein*, 259 So.2d 217 (Fla. App. 1955).

But the record is devoid of any evidence that defendant was able to comply with the order to produce issued by the court at the adversary hearing. Therefore, it is the opinion of a majority of this court, that the evidence is insufficient to support a finding that defendant-Hardy, at the time of the hearing, had knowledge of the location of the films, that he had possession and control of the films or that he refused to produce them for the court. By his own testimony Hardy denied both knowledge and possession. As to a refusal to produce the record shows only that defense counsel interposed the refusal to produce, after Hardy had denied possession. Tr. 26-27. It is impermissible to infer defense's ability to comply with the oral order to produce, absent any evidence to support the inference.

No other error appearing in the record, this cause is remanded to the Common Pleas Court for further proceedings according to law.

It is therefore considered that said appellant recover of said appellee its costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ DANIEL H. WASSERMAN
Chief Justice

WASSERMAN, *C.J.*, and DAY, *J.*, concur. (See Day, J. Concurring Opinion attached)

MANOS, *J.* dissents. (See Dissenting Opinion)

Concurring Opinion

DAY, *J.*—concurring:

I concur in the factual portions of the journal entry and in the reversal of the contempt conviction. However, I deem it unnecessary to assign reasons beyond the fact that the record evidence does not support possession in the alleged contemnor nor does it support any other violation of any order of the court. Under *Curcio v. United States*, 345 U.S. 118, 119-122, 1 L. Ed. 2d 1225, 1227-1229 (1957), of course, he had no obligation to discuss the whereabouts of the film ordered preserved by the court.

Dissenting Opinion

MANOS, *J.*—dissents.

On November 4, 1971, Detective James G. Kennelley of the Cleveland Police Department visited the Pussycat Cinex Theatre, defendant appellant herein, and viewed several films. After the viewing the officer signed an affidavit stating that the films entitled "ious Lush", "xie Tricks", "Tit for Tat", "Salesman", and "Bi-Girl" contained several explicit sexual scenes.

Being notified of Detective Kennelley's findings, the Cuyahoga County prosecutor moved the court for an immediate adversary hearing to determine whether the films referred to in the affidavit were obscene.

The court granted the prosecutor's motion, set the hearing for the next day, November 5, 1971, and made the following written order which was served on those present at the Pussycat Cinex Theatre: "* * * that the owners, management, operators, and employees of this Pussycat Cinex do not conceal, destroy, tamper with, or alter or remove the said films * * *."

At the hearing conducted on November 5, 1972, Detective Kennelley testified to what he had observed the previous day; Mr. Larry Hardy, manager of appellant, testified that he was responsible for the showing of all films at the Pussycat Cinex and that the films were at the theatre when he read a copy of the court's written order. When ordered by the trial judge to produce the films, Mr. Hardy agreed with his counsel that he would not produce them. Upon this refusal, the court found him in contempt.*

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*The following colloquy occurred at that November 5, 1971 hearing from which this appeal was taken:

(Continued on following page)

Appellant has raised and briefed two arguments on this appeal. He first advances:

"The privilege against self-incrimination is a sufficient bar against a finding of contempt, for failure to produce 'obscene' films."

Initially, it should be noted that the privilege of the Fifth Amendment, "* * * nor shall [any person] be compelled in any criminal case to be a witness against himself * * *", has been construed by the United States Supreme Court to apply only to testimonial utterances, not the production of physical evidence, and it is not available to corporations as a defense.

In *Schmerber v. California,* (1966) 384 U.S. 757, 764, the Court said, "* * * that the privilege is a bar against

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Footnote continued—

The Court: And sir, do you have the movies that we have been discussing in your possession?
Mr. Hardy: No sir, I don't.
The Court: Do you know where they are?
Mr. Hardy: No sir, I don't.

* * *

The Court: Were these films in the Pussycat Cinex then when you saw a copy of this (indicating the court's written order)?
Mr. Hardy: I imagine they were, yes, sir.
The Court: Were they being shown then?
Mr. Hardy: Yes, sir, they were, I'm pretty sure.
The Court: *All right, sir. I am ordering you to produce those films today.* (Emphasis supplied.)
Mr. Willis (attorney for defendant): Your Honor, I think we have already said *we are not going to produce them.* (Emphasis supplied.)
The Court: I understand; do you agree with your attorney, *you are not going to produce them*?
Mr. Hardy: Most certainly I agree with my counsel.
The Court: All right; then we are finding you in contempt and order that you be held in County Jail until you produce them.

Thus, it was for his refusal to produce the films when ordered to do so in open court and not for violation of the court's written order that Mr. Hardy was found in contempt of court.

compelling 'communication' or 'testimony', but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does *not* violate it." (Emphasis supplied.)

In *Curcio v. United States,* (1957) 354 U.S. 118, the court after citing *Hale v. Henkel,* 201 U.S. 43; *Wilson v. United States,* 221 U.S. 361; *Essgee Co. v. United States,* 262 U.S. 151; *Grant v. United States,* 227 U.S. 74; and *Wheeler v. United States* explained that they "stand for the principle that the books and records of corporations cannot be insulated from reasonable demands of governmental authorities by a claim of personal privilege on the part of their custodian.

Since the trial court in this case ordered the production of the films, and did not require incriminating testimony of the manager of Pussycat Cinex, no violation of the Fifth Amendment occurred.

Appellant further alleges that the film was neither owned nor controlled by Hardy when the order to produce the film was entered. The record reveals the following direct examination of Mr. Hardy; who voluntarily testified at the hearing:

> Q. Are you responsible for the showing of all films on the premises?
>
> A. Yes, sir, as manager I am, yes.

Upon inquiry by the court, Mr. Hardy testified as follows:

> Q. Did you receive a copy of this order yesterday, or did you see a copy?
>
> A. I saw a copy.
>
> Q. You saw a copy yesterday?
>
> A. Yes, sir.

Q. Were these films in the Pussycat Cinex then when you saw a copy of this (indicating)?

A. I imagine they were, yes, sir.

Thereupon, the court ordered the film to be produced, and upon Mr. Hardy's agreement with his counsel not to produce it he was found in contempt.

In this case, Mr. Hardy voluntarily testified in court that he was the manager of Pussycat Cinex Theatre, that he was responsible for the showing of all films on the premises, that he had seen a copy of the court's written order prohibiting anyone from removing, destroying or tampering with the films, that the films were being shown at the theatre when he saw the court's written order, and upon a verbal order of the trial judge in open court, the defendant refused to produce those films upon advice of counsel. These circumstances warrant a permissible presumption of present control of the films which can logically be deduced from Mr. Hardy's past possession of them.

In *Maggio v. Ziltz*, (1948) 333 U.S. 56, the court said at 65, "Under some circumstances it may be permissible, in resolving the unknown from the known, to reach the conclusion of present control from proof of past possession * * *.

"Of course, the fact that a man at one time had a given item of property is a circumstance to be weighed in determining whether he may properly be found to have it at a later date. But the inference from *yesterday's possession* is one thing, that permissible from possession twenty months ago, quite another * * *." (Emphasis supplied.)

Appellant secondly argues that "one cannot properly be regarded as being in contempt for failing to comply with an order which the court lacked the power to make."

R.C. 2705.02 reads in part, "A person guilty of any of the following acts may be punished as for a contempt:

(A) Disobedience of, or resistance to, a lawful * * * order * * * or command of a court * * *."

Further R.C. 2705.06 provides: "When the contempt consists of the omission to do an act which the accused yet can perform, he may be imprisoned until he performs it."

In *United States v. Bryan*, (1950) 339 U.S. 323, the court said "Ordinarily, one charged with contempt of court for failure to comply with a court order makes a complete defense by proving he is unable to comply. A court will not imprison a witness for failure to produce documents which he does not have, unless he is *responsible* for their unavailability * * *" (Emphasis supplied.)

I am aware of the United States Supreme Court decisions in *Marcus v. Search Warrant*, (1961) 367 U.S. 717 and *A Quantity of Books v. Kansas*, (1964) 378 U.S. 205 which deal with unlawful seizure of allegedly obscene material, and cognizant of R.C. 2905.37(A) which provides in part that an action may be maintained in the common pleas court to enjoin the sale, distribution, or presentation of the obscene material. But to enjoin the sale, distribution, or presentation of material not obscene is improper. Hence a proceeding must be conducted to determine if the material is obscene.

Thus an individual in possession of an allegedly obscene film, who receives notice of a court's written order directing preservation or production in court of such film and thereafter upon direct verbal order of the trial court to produce it, refuses to do so, can lawfully be held in contempt of court for his wilful failure to perform such act. For the foregoing reasons, I dissent.

APPENDIX C

Journal Entry of the Court of Common Pleas

(November 5, 1971)

IN THE COURT OF COMMON PLEAS
CRIMINAL BRANCH
STATE OF OHIO, COUNTY OF CUYAHOGA, SS:

THE STATE OF OHIO,
Plaintiff,

vs.

PUSSYCAT CINEX,
Defendant.

JOURNAL ENTRY

This cause was in Court this day for consideration of the Prosecuting Attorney's Motion for an Adversary Hearing on the movie films entitled "ious Lush," "xie Tricks," "Tit For Tat," "Salesman" and "Bi-Girl." Present in the courtroom for purposes of this hearing was one Larry Hardy. Mr. Hardy was called to the stand by James Willis, Attorney for the Defendant, Pussycat Cinex, Incorporated. Larry Hardy stated in open court that he had received the Order of this Court stating that any employee, manager, operator or owners of this theater not to remove any of the above-entitled films from this theater pending outcome of this Adversary Hearing.

Larry Hardy stated to this Court that he was the manager of Pussycat Cinex Theater and further stated that the films described above were in the theater while he

received the Order of this Court not to remove, conceal, alter or dispose of the above-entitled films.

It is the finding of this Court that Larry Hardy had properly received this Court's instructions ordering the above-entitled films to remain there pending this Adversary Hearing. Larry Hardy refused to abide by the orders of this Court; he has refused to produce the films in Court and will not comply with this Court's order to produce the above-entitled films.

It is therefore the Order of this Court that Larry Hardy be placed in the custody of the County Jail until he complies with the Court's Order to produce the above-entitled films.

APPENDIX D

Affidavit of Detective Kennelly

STATE OF OHIO, COUNTY OF CUYAHOGA, SS:

This is the affidavit of James G. Kennelly, Detective in the Cleveland Police Department, taken on this 4th day of November, 1971, in the City of Cleveland, County of Cuyahoga, State of Ohio.

I, James G. Kennelly, being first duly sworn according to law depose and state the following:

That I am a Detective with the Cleveland Police Department and that on the 4th day of November, 1971, I viewed several short motion picture films at the Pussycat Cinex located at 10606 Euclid Avenue, in the City of Cleveland, Cuyahoga County, State of Ohio.

The first film that I viewed had a title which was partially obscure, but I did make out the word "ious" and

the word "Lush." The second film bore the title of "xie Tricks." The third film I viewed bore the title "Tit For Tat." The next film bore the title "Salesman." The last film bore a title of "Bi-Girl" produced by Krevice Productions.

The films called "ious Lush," "xie Tricks," "Tit For Tat," "Salesman" and "Bi-Girl" contained several explicit sexual scenes. All of the films were in color. Each of the above-entitled films explicitly showed acts of sexual intercourse with sexual penetration fully shown on the screen. All of the above films contained scenes of oral sodomy and all of the films contained scenes of cunninglus. All of the films except the move entitled "Tit For Tat" showed sperm ejaculating from the male's penis. I paid a $4.00 admission fee to view these films.

/s/ JAMES G. KENNELLY

(Jurat omitted in printing)

APPENDIX E

Order of Common Pleas Court Granting Adversary Hearing

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, COUNTY OF CUYAHOGA, SS.

(Title omitted in printing)

The Court upon good cause shown grants the Prosecuting Attorney's Motion for an Adversary Hearing with respect to the movie films entitled "ious Lush," "xie Tricks," "Tit For Tat," "Salesman" and "Bi-Girl" now being shown at the Pussycat Cinex located at 10606 Euclid Avenue, Cleveland, Ohio, County of Cuyahoga.

Further, the Court grants to the Pussycat Cinex full opportunity for a complete hearing and should Pussycat Cinex desire to produce the said films at the time of the hearing, the Court will make a full review of their contents taking into consideration the present laws of obscenity.

It is further the order of this Court that in the event the said Pussycat Cinex does not desire to produce said films at this hearing that the owners, management, operators and employees of this Pussycat Cinex do not conceal, destroy, tamper with, or alter, or remove the said movie films entitled "ious Lush," "xie Tricks," "Tit For Tat," "Salesman" and "Bi-Girl" from the premises of the Pussycat Cinex until further order of this Court following the adversary hearing to be held on Friday, November 5, 1971, in the Court of Common Pleas, Criminal Courts Building, 1560 East 21st Street, Cleveland, Ohio at 1:30 PM.

Any violation of any portion of this Court Order shall be deemed to be contempt of Court and any person who violates this order shall be summarily brought before this Court for contempt proceedings.

/s/ GEORGE W. WHITE

Judge, Court of Common Pleas
Cuyahoga County, Ohio

APPENDIX F

Motion for Adversary Hearing

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, COUNTY OF CUYAHOGA, SS.

(Title omitted in printing)

Now comes the Prosecuting Attorney of Cuyahoga County and respectfully requests that the Court grant an adversary hearing for the movie films entitled "ious Lush," "xie Tricks," "Tit For Tat," "Salesman" and "Bi-Girl." These films are more fully described in the affidavit marked Exhibit A attached hereto, and made part of this motion. These movie films known as "ious Lush," "xie Tricks," "Tit For Tat," "Salesman" and "Bi-Girl" are being shown at the Pussycat Cinex located at 10606 Euclid Avenue, in the City of Cleveland, Cuyahoga County, Ohio.

The Prosecuting Attorney of Cuyahoga County says that the movie films entitled "ious Lush," "xie Tricks," "Tit For Tat," "Salesman" and "Bi-Girl" are obscene, in that,

(a) The dominant theme of the movie films taken as a whole appeals to a prurient interest in sex,

(b) The movie films are patently offensive because they affront contemporary community standards relating to the description or representation of sexual matters, and

(c) The movie films are utterly without redeeming social value.

These movie films were brought to our attention by Detective James G. Kennelly of the Cleveland Police Department. See the affidavit marked Exhibit A, attached hereto and made part of this motion.

The Prosecuting Attorney further requests that the Court order the Pussycat Cinex to preserve said films outlined in State's Exhibit A and be prohibited from removing, concealing, or altering or disposing of said films until the Court has a full adversary hearing on this matter and makes its ruling.

WHEREFORE, the Prosecuting Attorney of Cuyahoga County respectfully asks that the Court grant this motion for an adversary hearing and further that the hearing be held on Friday, November 5, 1971 at 1:30 PM.

/s/ JOHN T. CORRIGAN

Prosecuting Attorney, Cuyahoga County

/s/ GEORGE J. SADD

Assistant Prosecuting Attorney

FILE
28
MICHAEL ROBAK, JR.

In the Supreme Court of the United States

October Term, 1973
No. 73-1336

LARRY HARDY
and
PUSSYCAT CINEX, INC.,
Petitioners,
vs.
STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

JOHN T. CORRIGAN, *Prosecuting Attorney of Cuyahoga County, Ohio*
GEORGE J. SADD
Assistant Prosecuting Attorney
Criminal Courts Building
1560 East 21st Street
Cleveland, Ohio 44114
Attorneys for Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

In the Supreme Court of the United States

October Term, 1973
No. 73-1336

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To: *The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:*

OBJECTIONS TO JURISDICTION

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised in the Common Pleas Court of Cuyahoga County, the Court of Appeals of Cuyahoga County, and the Supreme Court of Ohio. The Court of Appeals reversed the ruling of the

Common Pleas Court without opinion. The Supreme Court of Ohio unanimously reversed the Court of Appeals with a written opinion.

The Ohio Supreme Court decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is therefore presented by the petition for certiorari.

QUESTIONS PRESENTED

Respondent submits that the questions presented by the record in this case are more properly stated as follows:

1. A corporation is not protected by the Fifth Amendment privilege against self-incrimination and a manager of the corporation who is responsible for the showing of all the films owned by the corporation may not withhold production of the films on the ground that he personally might be incriminated by their production.

2. A corporation is not protected by the constitutional privilege against self-incrimination and a corporate employee may not withhold property of the corporation on the ground that his corporation would be incriminated.

3. Allegedly obscene motion picture films kept in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination even though production of the films might tend to incriminate their keeper personally.

4. The Fifth Amendment privilege against self-incrimination applies only to testimonial or communicative acts on the part of the person to whom the privilege applies, and does not apply to acts non-communicative in nature.

5. The trial court was justified, based on the evidence adduced at an adversary hearing, in holding the theater manager of the corporation in contempt of court for refusing to produce allegedly obscene films where the record reveals that the manager admitted that he was responsible for the showing of all films at the theater and that the films were under his control and accessible to him.

STATEMENT OF FACTS

On November 4, 1971 at approximately 11:00 a.m. James G. Kennelly, a detective in the Cleveland Police Department, paid a $4 admission fee to view five short motion picture films at the Pussycat Cinex Theater, located in the City of Cleveland.

Following the viewing of the films, the detective swore to an affidavit explicitly describing scenes therein, of acts of sexual intercourse, penetration, oral sodomy, ejaculation and cunnilingus.

Thereupon, the Prosecuting Attorney for Cuyahoga County, moved in the Court of Common Pleas for an adversary hearing to determine whether these films were in fact obscene.

The court granted the motion and issued an order to the Pussycat Cinex Theater, informing it of the motion and granting a full opportunity for a complete hearing. The court also stated in the order:

> "That in the event the said Pussycat Cinex does not desire to produce said films at this hearing that the owners, management, operators and employees of this Pussycat Cinex do not conceal, destroy, tamper with or alter or remove the said movie films entitled 'ious Lush,' 'xie Tricks,' 'Tit for Tat,' 'Salesman,' and 'Bi-

Girl,' from the premises of the Pussycat Cinex until further order of the court following the adversary hearing to be held on Friday, November 5, 1971."

The order also provided that any violation of any portion of the court order would be determined to be contempt of court.

The Cleveland Police Department then returned to the Pussycat Cinex and the court order was served at 3:10 p.m. that same afternoon, November 4, 1971 on one Larry Hardy.

The police department further ascertained that the films that they had viewed earlier in the morning were still showing in the afternoon.

The record indicates that, at the adversary hearing held on Friday, November 4, 1971, the manager, Larry Hardy testified that he was the manager of the Pussycat Cinex, that he worked for that corporation and that he was responsible for the showing of all the films on the premises.

He further testified that he saw a copy of the court's order of November 4, 1971 and that at that time the films in question were in the Pussycat Cinex.

The trial court found that there was probable cause that the films in question were obscene and ordered Hardy to produce the films "in court today." Confronted with the court's order, Hardy refused to produce the films on the ground that disclosure of the films would violate his Fifth Amendment rights against self-incrimination.

The court then found Hardy in contempt and ordered him held in County Jail until such time as he produced the films.

REASONS FOR DENYING THE WRIT

The single issue presented by this appeal is whether or not the Pussycat Cinex and its manager, Larry Hardy, should have complied with the court's order to produce certain films which were in Hardy's possession and under his control. The record established that Hardy worked for the corporation and was the manager of the theater. Hardy stated that he had sole responsibility for all the films being shown at the Pussycat Cinex.

A corporation cannot claim the privilege against compulsory self-incrimination. See, for example, *U. S. v. Kordel,* 397 U.S. 1 (1970).

Along those same lines, it has been held that a corporate officer may not withhold testimony or documents on the ground that his corporation could be incriminated, nor may the custodian of corporate books or records withhold them on the ground that he personally might be incriminated by their production. See *Hale v. Hekle,* 201 U.S. 43 (1906); *Wilson v. U. S.,* 221 U.S. 361 (1911); *Essgee Co. v. U. S.,* 262 U.S. 151 (1923); *Curcio v. U.S.,* 354 U.S. 118 (1957).

More importantly, the Supreme Court of the United States in *McFaul v. U. S.,* 364 U.S. 372 (1960), rehearing denied, 364 U.S. 925, held that books and records kept in a representative rather than a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the records might tend to incriminate their custodian personally.

At this juncture, one can perceive that Hardy being an employee of the corporation is not on sound legal ground when he states that self-incrimination was a complete de-

fense for his refusal to turn the films in question over to the trial court.

In *McFaul*, the court reiterated the rule that a trial court will not imprison a witness for failure to produce documents which he does not have unless he is responsible for their unavailability or he is impeding justice by not explaining what happened to them. Again, the court in *McFaul* noted that it was incumbent upon a defendant in a contempt proceeding to show that the records called for by a subpoena did not exist, or that they were not in the defendant's possession or subject to his control at the time when their production was requested.

We submit that the films were in Hardy's possession and subject to his control at all times during the contempt proceedings.

We further submit that the opinion of the Ohio Supreme Court in the instant case was correct. The credibility of the witnesses in a contempt proceeding is, in the last instance, for the judge's determination. See *Nilva v. U. S.*, 352 U.S. 385 (1957), where the Court stated the following:

> "However, his protestations of good faith were subject to appraisal by the court that heard them. It was the judge of his credibility and of the weight to be given to his testimony."

CONCLUSION

In conclusion, the respondent submits that the petition herein fails to present any question of constitutional dimension justifying review by the Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN T. CORRIGAN, *Prosecuting Attorney of Cuyahoga County, Ohio*

By: GEORGE J. SADD
Assistant Prosecuting Attorney
Criminal Courts Building
1560 East 21st Street
Cleveland, Ohio 44114
Attorneys for Respondent